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Through the Looking Glass: Public Safety Agency Drone Policies and The Fourth Amendment

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SUPPLEMENTARY NOTES: Conclusions and opinions within this essay are provided for educational and informational purposes only and do not constitute legal advice. Opinions expressed within are solely those of the authors, and do not reflect the official policy of their employer, professional associations, the United State Naval Postgraduate School, the Department of Defense or the U.S. Government. Materials cited are current at the time of document creation, but should in no way be taken as an indication of future results. They are offered only for general informational and educational purposes. The model identified in this document provides recommended foundational elements for a UAV policy, based on the authors' interpretation and understanding of current legal precedent and public opinion. Any policy construction for a specific state or agency should be in accordance with the specific state or local laws.			
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ABSTRACT: (maximum 200 words) <p>Unmanned aerial vehicles (UAVs), or drones, are becoming an increasingly popular tool of choice for public safety organizations. Their relative cost, ease of use, and low human risk make them an attractive option for those charged with conducting law enforcement or rescue work. As this technology advances, public policy questions surrounding information collection, usage, and dissemination arise. In the absence of a federal standard, state legislatures and public safety agencies must shoulder the responsibility of protecting individual liberty and privacy concerns relative to this technology.</p> <p>This paper explores the current UAV landscape for governmental agencies. First, it will examine public opinion data on Americans' attitudes towards the usage of UAVs, both generally and with regard to specific use for law enforcement purposes. Next, it will examine the current legal framework governing their use, considering both the relevant Fourth Amendment jurisprudence decided by the United States Supreme Court as it applies to both manned and unmanned surveillance as well as the patchwork state legislation currently in place. Finally, this paper will propose a model statute that the authors believe is capable of both protecting individual Fourth Amendment rights, while at the same time enhancing the collective public safety of our communities.</p>			
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Introduction

As unmanned aerial vehicles¹ (UAVs, also known as “drones”) become increasingly popular and affordable, their public safety applications make them an attractive option for law enforcement as well as fire and rescue agencies.^{2,3} From search and rescue tracking to monitoring the hazardous release of chemicals, and from aerial anti-crime patrols to crime scene reconstruction, public safety agencies around the country are exploring the many uses that these relatively low cost UAVs can bring to bear.^{4,5,6,7} Their application, however, comes with public policy challenges, as legislators and public safety officials attempt to balance the perceived societal and safety benefits with the protection of an individual’s civil liberties and privacy rights.

This paper will explore the current UAV landscape from a variety of perspectives. First, it will examine public opinion data on Americans’ attitudes towards the usage of UAVs, both generally and with regard to specific use for law enforcement purposes. Next, it will examine the current legal framework governing their use, considering both the relevant Fourth Amendment jurisprudence decided by the United States Supreme

¹ President Barack Obama, *Presidential Memorandum Promoting Economic Competitiveness While*

² Jackie Northam, “Popularity Of Drones Takes Off For Many Countries,” July 11, 2011, <http://www.npr.org/2011/07/11/137710942/popularity-of-drones-takes-off-for-many-countries>. Accessed February 1, 2015.

³ Romesh Ratnesar, “Five Reasons Why Drones Are Here To Stay,” May 23, 2013, <http://www.bloomberg.com/bw/articles/2013-05-23/five-reasons-why-drones-are-here-to-stay>. Accessed February 2, 2015.

⁴ John Domen, “Montgomery County Fire Department Using Drones,” May 5, 2014, <http://washington.cbslocal.com/2014/05/05/montgomery-county-fire-department-using-drones/>. Accessed February 2, 2015.

⁵ Mary Rose Roberts, “5 Drone Technologies For Firefighting,” March 20, 2014, <http://www.firechief.com/2014/03/20/5-drone-technologies-firefighting/>. Accessed February 2, 2015.

⁶ Jack Nicas, “Drone Patrols on U.S. Border Ineffective, Report Finds,” *Wall Street Journal*, January 6, 2015.

⁷ Ryan, Haley, “Eye In The Sky: Nova Scotia RCMP Demonstrate New Drone To Be Used By Force,” July 23, 2014, Cape Breton Post <http://www.capebretonpost.com/News/Local/2014-07-23/article-3809595/Eye-in-the-sky%3A-Nova-Scotia-RCMP-demonstrate-new-drone-to-be-used-by-force/1>. Accessed February 3, 2015.

Court (the Court) as it applies to both manned and unmanned surveillance as well as the patchwork state legislation currently in place. Finally, this essay will propose a model statute that the authors believe is capable of both protecting individual Fourth Amendment rights, while at the same time enhancing the collective public safety of our communities.

Public Opinion

Complicating the construction of quality UAV policy is the wide variance of public opinion on the matter. For example, in a recent Reuters/Ipsos poll, respondents widely supported UAV use for law enforcement purposes.^{8,9} Of the sampled group, 68% of respondents supported police officers flying drones to solve crimes, and 62% supported using them to deter crime.¹⁰ Such numbers indicate that the majority of the American public supports public safety UAV use. However, as policy specifics enter the matrix, such as the type and length of usage allowable, as well as questions regarding oversight and accountability, the results reveal a much more finicky populous.

In a 2013 Monmouth University poll, a national sample of adults were asked their opinion about specific uses of UAVs or unmanned drones by law enforcement agencies.^{11,12} Their answers varied greatly when supplied with the specific use of the device. For example, while the overwhelming majority of respondents (83%) supported

⁸ Alwyn Scott, "Americans OK With Police Drones – Private Ownership, Not So Much: Poll," February 5, 2015, <http://www.reuters.com/article/2015/02/05/us-usa-drones-poll-idUSKBN0L91EE20150205>. Accessed February 25, 2015.

⁹ Ibid. (The Reuters/Ipsos poll was an online survey of 2,405 American adults, and has a credibility interval of plus or minus 2.3 percentage points).

¹⁰ Ibid.

¹¹ Monmouth University, "National: U.S. Supports Unarmed Domestic Drones. But Public Prefers Requiring Court Orders First," *Opinion Poll, Monmouth University Polling Institute*, Monmouth University, West Long Beach: Monmouth University, 2013.

¹² Ibid. (Monmouth University poll was conducted by telephone with 1012 adults. This sample has a margin of error of + 3.1 percent).

the idea of using UAVs to help with search and rescue missions, only 21% supported using them to monitor traffic enforcement laws and issue speeding tickets.¹³ More than three quarters of all Americans polled (76%) favored judicial oversight, noting that law enforcement agencies should be required to obtain a warrant from a judge before using UAVs, while only 14% stated that law enforcement agencies should be able to unilaterally determine when to use them.¹⁴ Further telling is that fewer than half (44%) of those surveyed stated that they were confident that their local police departments would use UAVs appropriately, while 51% were not.¹⁵

Overall, and especially important from a civil liberties and privacy perspective, the Monmouth University Poll revealed that most Americans raised privacy concerns regarding the routine employment of UAVs by law enforcement agencies.¹⁶ Indeed, nearly 85% of respondents expressed some level of concern when asked about safeguarding their personal privacy in relation to UAV use by law enforcement.¹⁷

The Legal Debate

The legal debate surrounding the use of UAVs by law enforcement agencies is focused primarily on the lack of procedural safeguards to adequately protect the Fourth Amendment rights of those individuals made the subject of surveillance.¹⁸ The Court's opinions applicable to this issue reveal an attempt to adhere to the plain language of the Fourth Amendment as well as to the intent of the Framers of the Constitution while, at

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Andrew B. Talai, "Drones and *Jones*: The Fourth Amendment and Police Discretion in the Digital Age," *California Law Review*, Vol. 102, Iss. 3, Art. 4 (June 1, 2014): 729, 731.

the same time, recognizing the ever-evolving technological landscape of the country.¹⁹ Legal scholars have criticized the Court's approach, asserting that the Court has erroneously focused on a narrow concept of "privacy" rather than giving credence to the broader concept of what the Fourth Amendment truly seeks to protect - personal liberty.²⁰ As the Court initially recognized in *Boyd v. United States*, the Fourth Amendment "secures relevant values of personal security, personal liberty, and private property."²¹ The specific verbiage of the Fourth Amendment states, in pertinent part, that individuals shall have the right "to be secure in their persons, houses, papers, and effect against unreasonable searches and seizures, thereby protecting individuals from such unreasonable searches and seizures by law enforcement agencies in connection with their investigative or law enforcement activities and operations."²² In fact, the term "privacy" is absent from the actual text of the Fourth Amendment.²³ By taking note of this fact, and recognizing the Fourth Amendment's protection of the broader concept of personal liberty, in addition to its traditional "privacy" interpretation, the Court can address the more relevant issue at hand for UAV use - law enforcement agencies' potential abuse of discretion in connection with their use of unmanned surveillance, as such abuse can lead to the undue restriction of an individual's freedom of movement as well as the unreasonable violation of that individual's Fourth Amendment rights.^{24 25} Indeed, as set

¹⁹ See generally *United States v. Jones*, 132 S. Ct. 945 (2012).

²⁰ Talai, "Drones and *Jones*: The Fourth Amendment and Police Discretion in the Digital Age," 733-34; Paul Ohm, "The Fourth Amendment in a World Without Privacy," *Mississippi Law Journal*, Vol. 81:5 (2012): 1311-12.

²¹ *Boyd v. United States*, 116 U.S. 616, 630 (1886); see also *Katz v. United States*, 389 U.S. 347, 350 (1967) (stating the Fourth Amendment "cannot be translated into a general constitutional 'right to privacy'").

²² U.S. CONST. amend. IV.

²³ *Ibid.*

²⁴ Ohm, "The Fourth Amendment in a World Without Privacy," 1310-11.

²⁵ Talai, "Drones and *Jones*: The Fourth Amendment and Police Discretion in the Digital Age," 734.

forth previously, it is the very attributes that make UAVs attractive to law enforcement – their discrete size, surveillance capabilities and cost effectiveness – that also render them susceptible to this abuse, allowing law enforcement officers to potentially exert a “nearly limitless expansion of police power”.²⁶ At the same time,

[r]isks to civil liberties are inherent in the very nature of domestic intelligence. This is because intelligence necessarily operates in secret and, as a result, it is exceedingly difficult to subject intelligence activities to the checks and balances that the Framers of the Constitution understood as essential to prevent abuses of power.²⁷

This dichotomy between the proper protection of an individual’s Fourth Amendment rights and the specific guiding policies that should define public safety UAV use only intensifies in the absence of a cohesive federal standard. At present, apart from the recently issued “Presidential Memorandum on Use of Unmanned Aircraft Systems” and the very basic guidelines issued by the Federal Aviation Administration (FAA) in its Modernization and Reform Act of 2012 (the Act), both of which are discussed *infra*, there is limited federal guidance defining appropriate deployment and usage of UAVs by government entities relative to public safety.^{28,29} The absence of an overarching federal standard leaves a wide range of significant policy issues to be determined by state and local municipalities, which has led to a patchwork of inconsistent state laws and further

²⁶ Chris Schlag, “The New Privacy Battle: How the Expanding Use of Drones Continues to Erode Our Concept of Privacy and Privacy Rights,” *University of Pittsburgh Journal of Technology Law and Policy*, Vol. 13:1 (Spring 2013): 6, 12; Talai, “Drones and Jones: The Fourth Amendment and Police Discretion in the Digital Age,” 734-35, 737; Hillary B. Farber, “Eyes in the Sky: Constitutional and Regulatory Approaches to Domestic Drone Deployment,” *Syracuse Law Review*, Vol. 64:1 (2014): 7.

²⁷ Kate Martin, “Domestic Intelligence and Civil Liberties,” *The SAIS Review of International Affairs*, Vol. 24, No. 1 (Winter-Spring 2004): 8.

²⁸ President Barack Obama, *Presidential Memorandum Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*, Presidential Memorandum, Office of the Press Secretary, The White House, Washington, DC: Executive Office of the President of the United States, 2015.

²⁹ “Unmanned Aircraft Systems,” Federal Aviation Administration. February 11, 2015. <https://www.faa.gov/uas/>. Accessed February 12, 2015.

creates a space for inconsistent legal opinions which will surely result as UAVs are actually employed by public safety agencies. As it stands, state and federal appellate courts will be hard pressed to find an unequivocal standard from the Court guiding UAV use, as its rulings to date relative to surveillance reveal minimal limitations on manned aerial surveillance and very limited guidance on unmanned aerial surveillance. Instead, the Court's only clear legal standard seems to be that "[c]itizens do not generally enjoy a reasonable expectation of privacy in public, nor even in the portions of their property visible from a public vantage."³⁰

The Cases

In 1967, in *Katz v. United States*, the Court considered the question of what constituted an unreasonable search in the context of wiretapping a telephone booth and using the information obtained to convict the plaintiff.³¹ In recognizing that the Fourth Amendment "protects people, not places", and that a court must look to the reasonableness of what the individual seeks to protect as private, the Court found that Katz was reasonable in expecting his telephone booth conversation to be private.³² Importantly, in so finding, the Court expanded the reach of the Fourth Amendment to protect one's reasonable expectation of privacy, and stated that such a consideration "cannot turn upon the presence or absence of a physical intrusion into any given enclosure."³³ Conversely, in his dissent, Justice Black concluded that the Framers of the Constitution were no doubt well aware of eavesdropping (which, he concluded, was

³⁰ M. Ryan Calo, "The Drone as Privacy Catalyst," *Stanford Law Review Online*, Vol. 64:29 (Dec. 12, 2011): 31.

³¹ *Katz*, 389 at 349-50.

³² *Id.* at 351, 353.

³³ *Id.* at 353 (stating that "[t]he fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance").

tantamount to wiretapping) and, if they had intended for the Fourth Amendment to apply to similar activity, they would have used appropriate language to do so.³⁴ Instead, they used references to a person's tangible effects, and he posited that the Fourth Amendment should be limited accordingly in its applicability.³⁵ Interestingly, he actually stated that is not for the Court to keep the Constitution "up to date" or in "harmony with the times".³⁶ Nonetheless, the entire Court agreed that the Fourth Amendment does not protect a person's general right to privacy; rather, only his or her reasonable expectation of privacy and the corresponding right to be free from certain kinds of governmental intrusion.³⁷

Applying the *Katz* reasonable expectation of privacy test, the Court ruled in *California v. Ciarolo* that the plaintiff homeowner did not have a reasonable expectation of privacy from the warrantless aerial surveillance of his backyard from 1000 feet above ground because, even though the backyard qualified as protectable "curtilage"³⁸ and was surrounded by a fence, the marijuana growing therein was "readily discernible to the naked eye" from public airways within lawful navigable airspace.³⁹ The dissent, however, distinguished using airspace in the normative fashion, i.e., for travel, business or pleasure, from the situation before it, i.e., for the specific purpose of observing activities taking place in the plaintiff's backyard.⁴⁰ Based on this distinction, the dissent

³⁴ *Id.* at 366 (Black, J., dissenting).

³⁵ *Id.* at 365, 367 (Black, J., dissenting).

³⁶ *Id.* at 373 (Black, J., dissenting) (as discussed *infra*, the attitude of the Court with regard to keeping up with the times has somewhat changed).

³⁷ *Id.* at 350, 373 (Black, J., dissenting).

³⁸ *California v. Ciarolo*, 476 U.S. 207, 212-13 (1986) (recognizing that "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened).

³⁹ *Id.* at 211, 213-15.

⁴⁰ *Id.* at 224 (Powell, J., dissenting).

manifested their doubt that society would be willing to “bear the risk of this type of warrantless police intrusion into their residential areas.”⁴¹

The Court subsequently extended the *Ciraolo* ruling to the context of law enforcement in *Dow Chemical Co. v. United States*, in which it ruled that enhanced aerial photography of an industrial plant complex – which is more akin to an “open field” rather than protectable “curtilage” – from lawful navigable airspace was not a “search” prohibited by the Fourth Amendment.⁴² In so ruling, the Court made the important distinction between the use of commercial aerial photography that “somewhat” enhanced human vision and the surveillance of private property by using “highly sophisticated surveillance equipment not generally available to the public, such as satellite technology,” the latter of which might be “constitutionally proscribed absent a warrant.”⁴³ The dissent condemned the ruling, stating that the majority ignored *Katz* and retreated from its previously stated standard that ensured adherence to traditional Fourth Amendment rights even as “technology expanded the Government’s capacity to commit unsuspected intrusions into private areas and activities.”⁴⁴ By essentially ignoring *Katz* and erroneously focusing on the manner of surveillance, the dissenting Justices predicted that the Court’s ruling would allow for “[Fourth Amendment rights] gradual decay as technology advances.”⁴⁵

Proving the dissent’s admonitions correct, the Court considered *Florida v. Riley* in 1989 and ruled that a helicopter flying over the plaintiff’s property at 400 feet above ground and observing plaintiff’s partially covered greenhouse, which contained

⁴¹ *Id.* at 225 (Powell, J., dissenting).

⁴² *Dow Chemical Co. v. United States*, 476 U.S. 227, 239 (1986).

⁴³ *Id.* at 238.

⁴⁴ *Id.* at 240 (Powell, J., concurring in part and dissenting in part)

⁴⁵ *Id.* at 240 (Powell, J., concurring in part and dissenting in part).

marijuana plants, did not constitute a violation of the Fourth Amendment.⁴⁶ The Court took specific note of the facts that 1) the helicopter was traveling within legally permissible airspace, and 2) there was nothing presented by counsel to suggest that helicopters flying at such altitude are “sufficiently rare in this country to lend substance to [plaintiff’s] claim that he reasonably anticipated that his greenhouse would not be subject to observation.”⁴⁷

However, the Court reaffirmed the Fourth Amendment’s protection of the “sanctity of the home” in *Kyllo v. United States* when faced with a search in which information was gathered through sense-enhancing technology from the interior of the home.⁴⁸ The Court specifically declined to distinguish between the types of information that could be obtained by surveillance and, instead, stated that the rule adopted must focus on the type of technology used or in development at the time.⁴⁹ Accordingly, the Court limited its ruling that the plaintiff’s Fourth Amendment rights were violated to situations “[w]here, as here, the Government uses a device that is not in general public use[.]”⁵⁰

Finally, and in what is surely an opinion that will be revisited many times as the use of UAVs becomes more commonplace, the Court ruled in 2012 in *United States v. Jones* that the attachment of an unmanned surveillance device – a Global-Positioning-System (GPS) tracking device – to a vehicle constituted a “search” within the meaning of the Fourth Amendment as “[t]he Government physically occupied private property for

⁴⁶ *Florida v. Riley*, 488 U.S. 445, 451 (1989).

⁴⁷ *Id.* at 451-52.

⁴⁸ *Kyllo v. United States*, 533 U.S. 27, 33, 37, 40 (2001).

⁴⁹ *Id.* at 36-37.

⁵⁰ *Id.* at 40.

the purpose of obtaining information”.⁵¹ The majority provided a useful summation of its previous rulings on the reaches of the Fourth Amendment and clarified that the *Katz* “reasonable expectation of privacy” test merely added to, not supplanted, the traditional “trespass” test. Indeed, in *Ciarolo*, *Kyllo* and *Dow Chemical Co.*, the Court rendered its opinion based on the law of trespass and considered whether there a physical intrusion on a “constitutionally protected area”.⁵² However, none of those cases considered a remotely operated camera or surveillance device. In fact, the Court opined that “[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis”, i.e., whether governmental agents violated an individual’s “reasonable expectation of privacy.”⁵³ In their respective concurrence opinions, Justices Sotomayor and Alito astutely emphasized that the technological advances that the Court will inevitably have to consider in the future will alter the *Katz* test as society’s privacy expectations progress.⁵⁴ Justice Sotomayor specifically noted the dual issues of 1) the Fourth Amendment’s goal of curtailing “arbitrary exercises of police power” as well as 2) the voluntary disclosure of personal information in the digital age, and acknowledged that in order to preserve constitutional protection, the interpretation of the Fourth Amendment cannot require secrecy as a prerequisite for privacy.⁵⁵ Thus, applying the Court’s reasoning in *Jones*, the important question inevitably arises of

⁵¹ *Jones*, 132 S.Ct. at 949 (the Court did not decide the question of whether the search was “reasonable” as the Government did not introduce that issue in the lower court and, thus, forfeited any consideration of same by the United States Supreme Court).

⁵² *Id.* at 951.

⁵³ *Id.* at 950, 953 (emphasis in original).

⁵⁴ *Id.* at 955 (Sotomayor, J., concurring); *Id.* at 962 (Alito, J., concurring).

⁵⁵ *Id.* at 957 (Sotomayor, J. concurring); *see also* Talai, “Drones and *Jones*: The Fourth Amendment and Police Discretion in the Digital Age,” 756 (stating that “if the public aspect of the reasonable expectation of privacy test is a moving standard that depends on technological progress, then the ease with which police may abuse discretion might be a more important consideration in regard to rapidly developing surveillance technologies”).

whether "the availability of [UAVs] for general use, combined with public knowledge of drone operation destroyed society's privacy expectations to the degree that individuals have no reasonable expectation of privacy from drone surveillance?"⁵⁶ Under the Court's current rulings, it is difficult to define a "reasonable expectation of privacy" when drones can be easily purchased through various distributors such as Amazon and eBay and are regularly featured in supply catalogs sent to public safety agencies. In fact, it is estimated that by 2020, approximately 30,000 drones will be operating in national airspace.⁵⁷

Legislation

In his concurring opinion in *Jones*, Justice Alito posited that "[i]n circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."⁵⁸ The problem with Justice Alito's position is the reality of a uniform legislative standard for law enforcement agencies. The recently released "Presidential Memorandum Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems" (Presidential Memorandum) provides a basic policy framework for the federal government's use of UAVs. This includes statements addressing First Amendment concerns, the promotion of transparency, and scheduled policy reviews.⁵⁹ While the issuance of this Presidential Memorandum appears

⁵⁶ Schlag, "The New Privacy Battle: How the Expanding Use of Drones Continues to Erode Our Concept of Privacy and Privacy Rights," 15.

⁵⁷ *The Future of Drones in America: Law Enforcement and Privacy Considerations: Hearing Before the Senate Committee On the Judiciary*, 113th Cong. 1 (2013) (statement of Sen. Patrick Leahy, Chairman, S. Comm. On the Judiciary).

⁵⁸ *Jones*, 132 S. Ct. at 964 (Alito, J., concurring) (internal citations omitted).

⁵⁹ President Barack Obama, *Presidential Memorandum Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*,

to be the first step in establishing a definitive policy at the federal level, it does not mandate or recommend any similar regulation for government agencies operating at the state or municipal level. Similarly, while the Act directs the FAA to promulgate regulations for the integration of UAVs in the national airspace no later than September 30, 2015, all indications is that such regulations will mainly concern domestic commercial UAV use, as opposed to governmental law enforcement use.⁶⁰ Moreover, the FAA's guidelines currently in place for UAV use mainly concern the safe and routine operations of unmanned surveillance aircraft as well as standards and requirements for registration and licensing of the operators, as opposed to any usable framework for safeguarding the previously-discussed Fourth Amendment liberty and privacy concerns.⁶¹

Given the scant federal framework, it stands to reason that such privacy regulation must be addressed by the states.⁶² However, not all of the states have enacted legislation and, of the ones that have, the requirements for UAV use by law enforcement agencies within those states' respective borders are not entirely consistent. For example, and by no means exhaustive, Virginia placed a moratorium on any UAV use prior to July 1, 2015 except in defined emergency situations in accordance with statutorily authorized color-coded emergency categories or in training exercises related to that emergency.⁶³ Indiana requires a law enforcement officer to obtain a search warrant prior to employing a UAV for law enforcement purposes with certain exceptions including, if exigent emergency circumstances are present, there is a "substantial likelihood" of a terrorist

Presidential Memorandum, Office of the Press Secretary, The White House, Washington, DC: Executive Office of the President of the United States, 2015.

⁶⁰ *FAA Modernization and Reform Act of 2012*, Public Law No. 112-95 (2012).

⁶¹ *Ibid.*

⁶² Margot E. Kaminski, "Drone Federalism: Civilian Drones and The Things They Carry," *California Law Review Circuit*, Vol. 4:57 (May 2013): 59.

⁶³ S.B. 1331, 2013 Gen. Assemb., Reg. Sess. (Va. 2013).

attack, there is a need to conduct a search and recovery operation, in connection with a natural disaster, or with consent.⁶⁴ Oregon bans weaponized drones in all situations and further bans drones by law enforcement personnel unless they have a warrant, they have probable cause without a warrant, or for search and rescue, or for a declared emergency, or for reconstruction of a crime scene, or for training.⁶⁵ Florida’s “Freedom From Unwarranted Surveillance Act” prohibits a law enforcement agency from using a drone to gather evidence or other information, but allows drone use if pursuant to a warrant, the United States government determines there is a terrorist attack or, the law enforcement agency has “reasonable suspicion that, under particular circumstances, swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to, facilitating the search for a missing person.”⁶⁶ Tennessee likewise requires a terrorist attack, a warrant or reasonable suspicion under the circumstances prior to the deployment of a drone by law enforcement agencies.⁶⁷ Texas permits UAV use to capture images pursuant to a search warrant or court order, but further allows UAV use in a swath of statutorily defined circumstances including, but not limited to, documenting or investigating a crime scene, “in immediate pursuit of a person law enforcement officers have reasonable suspicion or probable cause to suspect has committed an offense, not including misdemeanors or offenses punishable by a fine only”, as well as in circumstances in which such image-capturing is in furtherance of

⁶⁴ IND. CODE ANN. § 35-33-5-9 (2014).

⁶⁵ H.B. 2710, 77th Leg. Assemb. (Or. 2013) (full text of legislation may be found at Or. Rev. Stat. § 837.300 et seq. (2015)).

⁶⁶ FLA. STAT. ANN. § 934.50 (2013).

⁶⁷ TENN. STAT. ANN. § 39-13-609 (2013).

“preserving public safety, protecting property, or surveying damage or contamination during a lawfully declared state of emergency”.⁶⁸

However, in states like Missouri and Louisiana, where senior law enforcement officials claim citizens would most benefit from the use of UAVs by its respective law enforcement agencies, legislators have failed to successfully enact legislation that would facilitate such use.^{69,70}

The Louisiana legislature enacted a UAV surveillance law on August 1, 2014, which makes it illegal to intentionally use “an unmanned aircraft system to conduct surveillance of, gather evidence or collect information about, or photographically or electronically record a targeted facility without the prior written consent of the owner of the targeted facility.”⁷¹ However, specifically excepted from the definition of “unmanned aircraft system” are unmanned aircraft systems used by the federal or state government, or a person who is acting pursuant to a contract with either the federal or state government to conduct certain surveillance of specific activities as well as unmanned aircraft systems used by a local government law enforcement agency or fire department.⁷² There is no commensurate regulatory statute for UAV use by law enforcement agencies. Moreover, there is no Louisiana statute that prohibits the flying of drones over nonindustrial private property. Louisiana Sen. Dan Claitor attempted to rectify this gap and regulate UAV flights over private property through his introduction of Senate Bill

⁶⁸ See generally TEX. GOV'T. CODE ANN. § 423.002 (2013).

⁶⁹ Christine Byers, “St. Louis Police Chief Wants Drones to Monitor City,” June 23, 2013, http://www.stltoday.com/news/local/crime-and-courts-st-louis-police-chief-wants-drones-to-monitor-city-from/article_1f0a7488-855d-52cf-9590-03129ce48a06.html. Accessed February 3, 2015.

⁷⁰ Tom Gogola, “City Cancels Plans for Super Bowl Drone Despite Enthusiasm and Interest from NOPD, Others,” September 17, 2012, <http://thelensnola.org/2012/09/17/new-orleans-seeks-civilian-drone/>. Accessed February 8, 2015.

⁷¹ LA. REV. STAT. § 14:337(A) (2014) (targeted facilities include petroleum and alumina refineries, chemical and rubber manufacturing facilities and nuclear power electric generation facilities).

⁷² LA. REV. STAT. §§ 14:337(B)(4)(b)-(d) (2014).

330 on March 10, 2014, but was unsuccessful.⁷³ Claitor subsequently attempted to introduce an amendment to Louisiana’s “peeping Tom” statute in an effort to prohibit the use of UAVs over private property for the purpose of spying or invading another’s privacy without their consent, again expressly excepting authorized law enforcement uses, but was similarly unsuccessful in that effort.⁷⁴

Similar to Senate Bill 330 in Louisiana, the Missouri legislature considered the “Preserving Freedom from Unwarranted Surveillance Act”, which prohibited UAV surveillance on citizens of the state and their property, but allowed for an exclusion for “police working with a search warrant”. The Missouri Act further allowed for UAV use “in emergency situations if there is an imminent threat to life or of great bodily harm, including but not limited to fires, hostage crises, hot pursuit situations if reasonably necessary to prevent harm to law enforcement officers or others, and search and rescue operations on land or water.” The proposed law specifically excepted the necessity of a warrant for the use of UAVs “to assess the necessity of first responders in situations relating to traffic accidents or fires”.⁷⁵ While the Missouri Act passed the House, it was placed on the informal calendar and died there.

Model Policy

Even through a cursory review of the above-referenced statutes and proposed bills, it is clear that the first step in protecting the privacy and liberty concerns voiced by American citizens is by enacting consistent law that ensures that the discretion of law

⁷³ Emily Lane, “Drones to Remain Unregulated in Louisiana; House committee Kills Proposed DRONE Act,” May 6, 2014, http://www.nola.com/politics/index.ssf/2014/05/drones_louisiana_privacy_legis.html. Accessed February 25, 2015.

⁷⁴ Andrew Perzo, “La. Law Bars Drone Flights Near Industrial Plants,” September 28, 2014, <http://www.americanpress.com/La--law-bars-drone-flights-near-industrial-plants>. Accessed February 25, 2015).

⁷⁵ H.B. 1204, 97th Gen. Assemb., 2nd Reg. Sess. (Mo. 2014).

enforcement officers is adequately checked – whether by a warrant requirement or some other equally effective safeguard – which would prevent discriminatory law enforcement practices and ensure that officers will not have “dictatorial power over the streets”.⁷⁶ Legal scholars have suggested that this can be accomplished through the implementation of a baseline federal consumer protection law that governs surveillance and data collection in order to provide the public with “an accurate depiction of current expectations or privacy.”⁷⁷ Others have advocated for the requirement of a data collection statement by the agency using the technology or, alternatively, a UAV radio frequency identification to track the location of the UAV in the event of litigation based on the violation of privacy.⁷⁸ The underlying argument for these positions – and the opinion of the authors – is that a baseline federal law will provide the consistency that is missing as a result of the current state laws and will further provide a framework from which states can implement particular protections relative to their respective needs.⁷⁹ Until such legislation is ratified, the authors of this paper propose the following model policy, utilizing standing guidance from the Drone Aircraft Privacy and Transparency Act of 2013 (HR1262), the Presidential Memorandum, and the American Civil Liberties Union’s Recommendations for Government Use of Drone Aircraft (cited *infra*):⁸⁰

⁷⁶ Talai, “Drones and *Jones*: The Fourth Amendment and Police Discretion in the Digital Age,” 774; Tracey Maclin, “The Decline of the Right of Locomotion: The Fourth Amendment on the Streets,” *Cornell Law Review*, Vol. 75: 1258 (1990): 1261 (quoting, Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 *Crim. L. Bull.* 205, 222 (1967)).

⁷⁷ Schlag, “The New Privacy Battle: How the Expanding Use of Drones Continues to Erode Our Concept of Privacy and Privacy Rights,” 21-22; *see also* Kaminski, “Drone Federalism: Civilian Drones and The Things They Carry,” 65.

⁷⁸ Kaminski, “Drone Federalism: Civilian Drones and The Things They Carry,” 67.

⁷⁹ Schlag, “The New Privacy Battle: How the Expanding Use of Drones Continues to Erode Our Concept of Privacy and Privacy Rights,” 22.

⁸⁰ The model identified in this document provides recommended foundational elements for a UAV policy based on the authors’ interpretation and understanding of current legal precedent and public opinion. Any

The legislative body or individual organization desiring to utilize UAVs for public safety use shall appropriately construct and define local policies and procedures that address:

- 1.) Activity – “When specifically targeting an individual(s), an agency must do so ONLY when pursuant to a warrant or court order meeting specified requirements under applicable law, OR where an emergency situation exists that involves immediate danger of death or serious physical injury to any person, or conspiratorial activities threatening the national security interest.”⁸¹
- 2.) Collection and Use. “Agencies shall only collect information using UAVs to the extent that such collection or use is consistent with and relevant to a legally authorized purpose.”⁸²
- 3.) Information Retention. “Information collected using UAVs shall not be retained for more than 180 days unless retention of the information is determined to be necessary to an authorized mission of the retaining agency, is maintained in a system of records covered by the Privacy Act, or is required to be retained for a longer period by any other applicable law or regulation including, but not limited to, retention requirements applicable to any pending litigation and/or similar proceeding in which such information is required to be retained.”^{83,84}

policy construction for a specific state or agency should be in accordance with the specific state or local laws.

⁸¹ Drone Aircraft Privacy and Transparency Act of 2013, HR1262, 113th Cong. (2013).

⁸² President Barack Obama, *Presidential Memorandum Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*, Presidential Memorandum, Office of the Press Secretary, The White House, Washington, DC: Executive Office of the President of the United States, 2015.

⁸³ Ibid.

⁸⁴ *An Act to amend title 5, United States Code, by adding a section 552a, to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning*

4.) Dissemination. “UAV-collected information that is not maintained in a system of records covered by the Privacy Act shall not be disseminated outside of the agency unless dissemination is required by law, or fulfills an otherwise legally authorized purpose and complies with agency requirements.⁸⁵ ⁸⁶ Notwithstanding the foregoing, any such dissemination shall only be disclosed to the extent necessary and to only those individual(s) and/or agency(ies) that are required to obtain such information pursuant to applicable law, and such individual(s) and/or agency representative(s) shall execute any and all necessary non-disclosure and/or similar documentation evidencing the reasonable protection of said information from unauthorized disclosure.”⁸⁷

In addition to the foregoing, the authors propose that the legislative body or individual organization using the UAV shall appropriately comply with the following regulatory measures that minimize the collection or disclosure of covered information:⁸⁸

- a. “Any government entity operating a UAV shall submit the appropriate application to do so with the FAA for the appropriate certificate and/or

them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes, Pub. L. No. 93-579, as codified at 5 U.S.C. 552a (1974).

⁸⁵ President Barack Obama, *Presidential Memorandum Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*, Presidential Memorandum, Office of the Press Secretary, The White House, Washington, DC: Executive Office of the President of the United States, 2015.

⁸⁶ *An Act to amend title 5, United States Code, by adding a section 552a, to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes*, Pub. L. No. 93-579, as codified at 5 U.S.C. 552a (1974).

⁸⁷ Drone Aircraft Privacy and Transparency Act of 2013, HR1262, 113th Cong. (2013).

⁸⁸ "Covered Information" as defined in H.R.637 - Preserving American Privacy Act of 2013, specifically, (1) information that is reasonably likely to enable identification of an individual, or (2) information about an individual's property that is not in plain view.

license to operate such a system in the national airspace in accordance with all applicable requirements promulgated and in force at that time.”⁸⁹

- b. Any government entity operating a UAV shall submit to their respective state’s Attorney General a statement of airworthiness relative to the type of UAV proposed to be used along with 1) a statement of planned initial training and continuing education for controllers, 2) a statement of planned general maintenance in accordance with manufacturer’s recommendations, 3) a data collection statement that describes the purpose for which the UAV will be used, the length of time the collected information will be retained, the entity responsible for operating the system, the data minimization policies barring the collection of information unrelated to the defined purpose of use and requiring the destruction of information that is no longer relevant, and 4) a statement setting forth the relevant agency’s audit, accountability and oversight procedures.⁹⁰
- c. Any government entity operating a UAV shall enforce a policy whereby it agrees to submit that an external audit that allows for random checks of compliance to the submitted and established policies, as well as a defined punitive process for infraction, including, but not limited to, revocation of its FAA license or certificate, as applicable.⁹¹

⁸⁹ “Unmanned Aircraft Systems,” Federal Aviation Administration. February 11, 2015. <https://www.faa.gov/uas/>. Accessed February 12, 2015.

⁹⁰ Drone Aircraft Privacy and Transparency Act of 2013, HR1262, 113th Cong. (2013).

⁹¹ “Unmanned Aircraft Systems,” Federal Aviation Administration. February 11, 2015. <https://www.faa.gov/uas/>. Accessed February 12, 2015.

- d. Any government entity operating a UAV shall establish a process relative to administrative discipline proceedings for personnel who exceed the scope or limits of defined use of a UAV including, but not limited to, criminal penalties and/or sanctions as set forth in applicable federal, state and municipal law.⁹²
- e. Any government entity operating a UAV shall ensure that when UAVs are employed in any joint agency operations, any and all data collection and sharing agreements or policies, data use policies, and record management policies conform to all applicable laws, regulations, and policies of the organization to which the UAV is licensed.⁹³

Notwithstanding the foregoing, the licensed government entity shall not operate a public unmanned aircraft system or otherwise collect or disclose information obtained by means of unmanned surveillance, except:

- (1) “Pursuant to a warrant or court order meeting specified requirements as set forth by applicable law”^{94,95};
- (2) “With the prior written consent of the individual made the subject of the unmanned surveillance”;⁹⁶ or

⁹² Jay Stanley and Catherine Crump, “Protecting Privacy From Aerial Surveillance: Recommendations for Government Use of Drone Aircraft,” *Position Paper*, American Civil Liberties Union, New York: ACLU (Dec. 2011): 22. <https://www.aclu.org/files/assets/protectingprivacyfromaerialsurveillance.pdf>.

⁹³ President Barack Obama, *Presidential Memorandum Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*, Presidential Memorandum, Office of the Press Secretary, The White House, Washington, DC: Executive Office of the President of the United States, 2015.

⁹⁴ Drone Aircraft Privacy and Transparency Act of 2013, HR1262, 113th Cong. (2013).

⁹⁵ Stanley and Crump, “Protecting Privacy From Aerial Surveillance: Recommendations for Government Use of Drone Aircraft,” ____.

⁹⁶ Drone Aircraft Privacy and Transparency Act of 2013, HR1262, 113th Cong. (2013).

- (3) “In an emergency situation which involves immediate danger of death or serious physical injury to any person, or activities threatening the national security interest and that requires immediate action such that a warrant or order cannot reasonably be obtained, but which bars covered information obtained otherwise from being introduced as evidence in any trial, hearing, or other proceeding.”^{97,98}

Prohibits: (1) intentionally operating an unmanned aircraft system to capture any type of visual image, sound recording, or other physical impression of an individual engaging in personal activity under circumstances in which the individual has a reasonable expectation of privacy including, but not limited to, within his or her physical residence and the bordering “curtilage” that is not in any way visible from lawful public airspace⁹⁹; and (2) any investigative or law enforcement officer from operating an unmanned aircraft system that is armed with a firearm within U.S. airspace.¹⁰⁰

The authors posit that the aforesaid general framework is responsive to the public desire for law enforcement accountability and oversight while not being overly burdensome to individual public safety agencies. The proposed framework can be applied and expanded as dictated by community specific concerns, local laws, or additional court rulings. While designed chiefly as a framework for state legislators, in the absence of state legislation, it can be applied at both the municipal and/or individual agency level as a proactive step in safeguarding liberty and privacy while bringing this powerful tool to bear for the safety of communities.

⁹⁷ Ibid.

⁹⁸ Stanley and Catherine Crump, “Protecting Privacy From Aerial Surveillance: Recommendations for Government Use of Drone Aircraft,” p. 15-16.

⁹⁹ Drone Aircraft Privacy and Transparency Act of 2013, HR1262, 113th Cong. (2013).

¹⁰⁰ Ibid.

Conclusion

The relative affordability, the technological capabilities, and the minimized human risk to first responders make UAVs an attractive option for public safety agencies across the country. As usage models shape their application for official duties, legislators, city leaders, and senior agency officials should craft policies that maximize benefit to their operations while safeguarding the individual privacy rights of citizens.

This paper has taken in to account recent public opinion, as well as the relevant legal and legislative landscape in order to make recommendations for policy construction. It concludes that, generally speaking, the public is open to the prospect of UAV technology being applied for public safety in their communities, subject to an appropriate system of checks and balances to protect their privacy and liberty rights. Accordingly, while the making of public policy is often shaped by values and politics, it should be rooted in law and legal theory.¹⁰¹ While there can be no doubt that individuals do not generally enjoy a right to the reasonable expectation of privacy in a publicly viewable space, even if only in part, the ever-expanding existence and accessibility of technology in individuals' daily lives leaves open the question of what sort of privacy expectation is still "reasonable". The current legislative landscape has attempted to address the reasonability question through the conditions it has placed on governmental UAV usage such as warrant and/or emergent circumstances requirement. However, these standards are neither uniform nor in effect across the country. This, of course, cannot persist as domestic UAV usage by government agencies becomes more ubiquitous. Moreover, in addition to initial policy standards that will have to be implemented, the guidelines

¹⁰¹ John Baldock, Nick Manning, Sarah Vickerstaff, and Lavinia Mitton, *Social Policy*. 4th ed. (United Kingdom: Oxford University Press, USA (2011)).

adopted must be continuously restructured in order to keep pace with federal law, legal findings and public opinion.

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